ter, in the absence of constitutional restriction.' • • • The federal Income Tax Law, referred to in the State Act is as fully effective in the State of South Carolina for the purposes of the national government as if it had been reenacted totidem verbis by the General Assembly of South Carolina. • • • The State Tax commission has no power delegated to make any rules or regulations inconsistent with the law enacted or for any other purpose than to carry out the legislative will expressed in statutory form."

• • • • •

"Since the Federal statute and the Federal rules and regulations govern, if the contention of the state tax commission should prevail, then this statute and these regulations would be set aside, and regulations made by the State tax commission would be substituted in their stead, and a tax would be collected by the state, when none is found to be due the Federal Government, and the state could only, in any event, collect a sum equal to 33 1-3% of the amount which was paid to the federal government, and, when no tax is exacted, or found to be due by the federal government, none can be collected by the State tax commission.

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"The state tax commission will therefore make its books and rules and regulations conform to the Federal Statute and the Federal rules and regulations promulgated in pursuance of the statute."

This Court likewise held in *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202, 205, as follows:

"But we do not think the contention that the act adopts or attempts to adopt future laws, rules and regulations of the Federal government is warranted by the language of the statute. The reference (section 2 of the

act) is to the United States Income Tax Act of November 23, 1921, and acts amendatory thereto 'which have been passed and approved prior to the time of the approval of this act.' The 'rules and regulations promulgated by the Department of Internal Revenue under and by virtue of said acts' are also adopted in the state act. While the language used with respect to said 'rules and regulations' is perhaps broad enough to cover future rules and regulations, in the absence of a clear indication of a different intention, it will be presumed that it was the intent of the lawmakers to restrict the application of the statutory provision in question to the legitimate field of legislation (6 R.C.L., p. 80; *School Town of Andrews v. Heiney*, 178 Ind. 1, 98 N.E. 628, 43 L.R.A., N.S., 1023, Ann. Cas. 1915B, 1136; *Commonwealth v. People's Express Co.*, 201 Mass. 564, 88 N.E. 420, 131 Am. St. Rep. 416), and that the rules and regulations thus adopted by reference were those in force at the time of the approval of the act."

When the Income Tax Act of 1922 was adopted by the General Assembly of this State, the cases of *Towne v. Eisner* and *Eisner v. Macomber, supra*, had already been decided by the Supreme Court of the United States. The Federal Revenue Act of 1921 was also in effect at the time the General Assembly of South Carolina adopted the Federal Income Tax Act, and it provided "a stock dividend shall not be subject to tax". If this case had to be decided under the provisions of the Income Tax Act of 1922 and the two Supreme Court decisions above referred to, we would, under the rule set out in *Fuller v. South Carolina Tax Commission, supra*, be compelled to hold that the judicial construction and interpretation of the Federal Income Tax Act, as to dividends, would be binding upon this Court. This would be in line with the holding of this Court in the case of *Pacolet Mfg. Co. v. Query*, 174 S.C. 359, 177 S.E. 653, 655 98 A.L.R. 1440, where this Court was called upon to

determine whether it was proper to include in the capital stock for assessment of license tax the stock issued by way of stock dividend, it appearing that in 1923 the entire capital stock of Pacolet Mfg. Co. amounted to $4,000,000, one-half of which had been paid in cash, or its equivalent, by the stockholders, and the other one-half had been issued to the stockholders out of the surplus or earnings by way of a stock dividend. This Court said:

> "The corporation and its duly constituted authorities, having elected to transfer the surplus fund to capital stock, which made said dividend stock not taxable as income under the federal or the state law, cannot now escape the state license tax by saying that this stock is still surplus."

By Act No. I, approved October 12, 1926, 35 Stats. 1, the General Assembly of this State adopted the "Income Tax Act of 1926". This Act, with amendments, is now incorporated in Title 65—Sections 201-367, inclusive, 1952 Code of Laws of South Carolina. It was provided in the basic Act "that on the passage of this Act, the Income Tax Act approved the 13th day of March, 1922, as amended, is repealed, to take effect January 1st, 1926". § 42.

Upon the enactment by the General Assembly of this State of the "Income Tax Act of 1926", the Income Tax Act of 1922 was fully and completely repealed. What was the effect of the repeal? In *South Carolina Mental Health Comm. v. May*, 226 S.C. 108, 83 S.E. 2d 713, 716, it is stated:

> "The general rule, of course, is that the repeal of a statute has the effect of blotting it out as completely as if it had never existed and of putting an end to all proceedings under it. 59 C.J. 1189, 1190, and cases there cited."

(3) It is apparent by the enactment of the "Income Tax Act of 1926" that the General Assembly decided to have a separate and distinct income tax law. The repeal of the

Income Tax Act of 1922 completely removed from the Income Tax Laws of South Carolina any reference to the Federal Income Tax Act. The General Assembly refused to adopt in the State Income Tax Act the provisions in the then current Federal Act, which specifically exempted stock dividends from income tax. This action of the General Asembly shows a legislative intention that a preferred stock dividend should be taxed as income. If the General Assembly had intended to follow and adopt the Federal Rule, it would have been quite easy and appropriate, if such was the intention of the Legislature, for it to say in the new enactment, when it used the word "dividends", but that such should not include a stock dividend.

In Title 65—Section 251 of the 1952 Code of Laws of South Carolina, gross income is defined as follows:

> "The words 'gross income' mean the income of a taxpayer derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, and also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit and income derived from any source whatsoever. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer unless, under the methods of accounting permitted under this chapter, any such amounts are to be properly accounted for as of a different period."

What is the definition of a "dividend"? In what sense did the General Assembly use this word in the Income Tax Act? This Court in *Gable v. South Carolina Tax Commission*, 189 S.C. 346, 1 S.E. 2d 244, 246, gave a definition of dividends in the following language:

"Dividends have been defined as a 'fund set apart out of profits, to be apportioned among the shareholders.' 18 C.J., 1406. In *Lynch vs. Hornby, supra,* the Court had this to say thereabout: 'Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation.'"

This Court has announced the rule that the word "income" as used in a tax statute is to be taken in its ordinary sense of gain or profit. *Southern Weaving Co. v. Query,* 206 S.C. 307, 34 S.E. 2d 51; *Beard v. South Carolina Tax Commission,* 230 S.C. 357, 95 S.E. 2d 628.

In *Etiwan Fertilizer Co. v. South Carolina Tax Commission,* 217 S.C. 354, 60 S.E. 2d 682, 684, the following rule was announced:

"We have likewise held that in the construction of a statute, if its terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense. *Weston v. Board of Com'rs of Police Insurance and Annuity Fund,* 196 S.C. 491, 13 S.E. 2d 600; *Windham v. Pace,* 192 S.C. 271, 6 S.E. 2d 270. The prime object, of course, in the construction of a statute is to ascertain and give effect to the legislative intent."

(4) It is logical to conclude that the General Assembly of this State having repealed the Income Tax Act of 1922, in its entirety, thereby eliminating as a part of the Income Tax Law, the Federal Act, which had been incorporated therein by reference, was no longer to be bound by the Federal Act nor any decisions of any Court con-

struing such Act. We so hold.

We must construe the word "dividend" in the plain, ordinary and popular sense of gain or profit. There is nothing in the Income Tax Act of 1926 which shows that the General Assembly used the word in a technical or peculair sense. It did not see fit to place any limitation or condition in the Act in connection with the use of the word which requires any other construction.

(5) The dividend received by J. A. Roper was of preferred stock and, while the record does not reflect the preferences, conditions, restrictions and liabilities, if any, fixed in such certificates of preferred stock, it is common knowledge that such has different characteristics from common stock. We can assume that in the issuance of the preferred stock, the provisions of Title 12—Section 211 et seq., were used as the basis for the issuance thereof.

In the case of *Georgia Power Co. v. Watts*, 184 Ga. 135, 190 S.E. 654, 659, 110 A.L.R. 465, we find the following:

> "The term 'preferred stock,' according to general legal interpretation, is stock which entitles the holder to receive dividends from the earnings of a company before any dividends are paid on the common stock. By a 'dividend' is meant money paid out of its profits by a corporation to its stockholders in priority to that to be paid to another class."

In 13 Am. Jur., Corporations, para. 201, at page 319, it is said:

> "The peculiar and distinguishing characteristic of preferred stock is that it is entitled to a priority over other stock in the distribution of profits, being ordinarily entitled to dividends of a definite percentage or amount. Preferred stockholders may, however, by agreement be given a preference over common stockholders in the capital of a corporation, and such pref-

erence will be given effect upon a dissolution of the corporation."

In the Order of the lower Court there is cited the case of *Wilson v. South Carolina Tax Commission*, 220 S.C. 171, 66 S.E. 2d 698, and it is asserted that the case held "although the facts are not identical, that case squarely decides that a stock dividend is income within the meaning of our Income Tax Act." We should point out that the *Wilson* case did not go to the extent of holding that a stock dividend is income within the meaning of the Income Tax Act, because there a new corporation was formed to which a portion of the surplus of an existing corporation was transferred in order to insulate its real estate from liability. As a part of the plan the shares of the new corporation were distributed to the shareholders of the old corporation. It was held that the shareholders received a distribution of the profits of the old corporation and were liable for income taxes thereon.

(6) It should be stated that the holding we have here made as to the taxability of a preferred stock dividend is in accord with that adopted by the Tax Commission. This construction as given by the Tax Commission is entitled to most respectfuly consideration, and ought not to be overruled without cogent reasons. *Asmer v. Livingston*, 225 S.C. 341, 82 S.E. 2d 465.

We conclude that the lower Court was correct in sustaining the demurrer interposed by the respondent to the complaint by appellants.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, J. J., concur.

PETITION FOR RE-HEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

The Petition of the Plaintiffs-Appellants, J. A. Roper and Frances G. Roper, respectfully shows:

Petitioner requests of the Court under Rule 17 for a rehearing in this case upon which opinion has been heretofore filed by the honorable Court, in that the following points, Appellants most respectfully submit, have been overlooked or misapprehended:

1. The Court, it is respectfully submitted, overlooked passing upon the Federal constitutional question presented to the trial Court (transcript of record page 2, folio 7) and reserved on appeal by exceptions (transcript of record pages 22-23, folio 87-89) and argued on appeal as one of the reasons why Appellants' Complaint states a cause of action (Appellants' Brief, pages 24-26), to-wit, that to find and declare a dividend of preferred stock by a corporation, all of whose outstanding stock was owned by the Appellants, to be income when in fact it is submitted such a stock dividend is not income, violates Paragraph 1, Amendment XIV of the Constitution of the United States in that such constitutes a taking of Appellants' property without due process of law.

2. The Court, it is respectfully submitted, overlooked passing upon the constitutional question presented to the trial Court (transcript of record, page 2, folio 7) and reserved on appeal by exceptions (transcript of record, page 19, folio 74 and pages 22-23, folio 88-89) and argued on appeal as one of the reasons why Appellants' Complaint states a cause of action (Appellants' brief, pages 24-26), to-wit, that to find and declare a dividend of preferred stock by a corporation, all of whose outstanding stock was owned by the Appellants, to be income when in fact it is submitted such a stock dividend is not income, violates Paragraph 5 of Article I of the Constitution of South Carolina of 1895,

in that such constitutes a taking of Appellants' property without due process of law and denies Appellants equal protection of the law.

3. It is respectfully submitted that the Court overlooked the fact that when the South Carolina Income Tax Statute of 1926 was adopted, repealing the Act of 1922, the General Assembly of South Carolina adopted the same definition of gross income as was contained in the applicable Federal Income Tax Statute (which was the same definition as contained in the 1922 Statute) and such Statute had been construed by the Supreme Court of the United States in *Towne v. Eisner*, 245 U.S. 418, 62 L.Ed. 372, 38 S.Ct. Rep. 158 L.R.A. 1918-D 254 and *Eisner v. Macomber*, 252 U.S. 189, 64 L.Ed. 521, 40 S.Ct. Rep. 189, 9 A.L.R. 1570 to the effect that a stock dividend was not gross income within the meaning of the term as used in the Federal Statute. Such definition, it is submitted, was in the mind of the General Assembly at the time it passed the Act of 1926.

4. It is respectfully submitted that the Court overlooked the fact that the General Assembly of South Carolina, in defining gross income (Title 65-251 of the Code of 1952), made no distinction between stock dividends of preferred stock and dividends of common stock.

5. In holding: "If this case had to be decided under the provisions of the Income Tax Act of 1922 and the two Supreme Court decisions above referred to, we would, under the rule set out in *Fuller, et al, vs. South Carolina Tax Commission, supra*, be compelled to hold that the judicial construction and interpretation of the Federal Income Tax Act, as to dividends, would be binding upon this Court," the the Court overlooked the fact that Section 22(a) of the Federal Revenue Act was in force in 1922 and also in 1926 and that the South Carolina General Assembly re-adopted the same definition of gross income in both Statutes as evidenced by the use of the wording: ". . . and also from interest, rent, dividends, securities or the transaction of any

business carried on for gain or profit and income derived from any source . . ."

Respectfully submitted,

ROBERT A. DOBSON, JR.,
JULIEN D. WYATT,
FELIX L. FINLEY, JR.,
JOHN T. GENTRY,
Attorneys for Appellants.

CERTIFICATE FROM COUNSEL

The undersigned firm of attorneys engaged in general practice of law at Greenville, South Carolina, do hereby certify to the following facts:

At the request of counsel for appellants in the case of *J. A. Roper and Frances G. Roper, appellants, v. South Carolina Tax Commission and Otis W. Livingston, Chairman, James W. Crain, James H. Sullivan, James A. Calhoun, Jr., and Francis M. Pinckney, Constituting the Members of The South Carolina Tax Commission, Respondents,* (case No. 4240, opinion No. 17335, filed July 30, 1957), we have carefully read the transcript, arguments, the opinion of the Court, and the petition for rehearing, and have given some study and thought to the decisions therein cited, with the view of ascertaining whether or not we could give the opinion required by Rule 17.

We have made a conscientious effort fully to comply with the Court's ideas as to what should be done in such a matter, by "counsel not concerned in the case," and now give it as our professional opinion that there is merit in the grounds of the petition for rehearing, and that the same is not intended for any purpose of delay.

LOVE, THORTON & ARNOLD

BY: JAMES L. LOVE.

ORDER DENYING PETITION FOR RE-HEARING

"After careful consideration of the within Petition for Rehearing, we are satisfied that none of the points therein referred to was overlooked or misapprehended in the Opinion heretofore filed. The Petition is accordingly denied.

August 20, 1957.

T. H. STUKES, C.J.
C. A. TAYLOR, A.J.
G. DEWEY OXNER, A.J.
LIONEL K. LEGGE, A.J.
JOSEPH R. MOSS, A.J."

CERTIFICATE OF CLERK

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, hereby certify that the foregoing Appendix contains true and correct copies of Order of Court of Common Pleas of Pickens County, opinion of the Supreme Court of South Carolina, Petition for Re-Hearing and Order Denying Petition for Re-Hearing in the foregoing case.

J. B. WESTBROOK,
Clerk of the Supreme Court
for South Carolina.